DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 05-0053
GROSS RETAIL TAX
For 2001 through 2003

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. **Purchase of Asphalt from Illinois Vendors** – Sales Tax.

Authority: IC 6-2.5-2-1; IC 6-2.5-3-2; IC 6-2.5-3-5(a); 45 IAC 2.2-3-16; Ill. Admin. Code tit. 86, § 130.605(a)(1)-(2); Ill. Admin. Code tit. 86, § 130.605(b); Ill. Admin. Code tit. 86, § 130.605(d).

The taxpayer protests the Department's decision to assess use tax on asphalt material purchased in Illinois, transported to Indiana, and used within Indiana construction projects.

II. **Use Tax Assessments**.

Authority: IC 6-8.1-5-1(b).

Taxpayer maintains that it is not required to pay Indiana use tax on the purchase of capital assets, vehicles, and various tools and other equipment on the ground that taxpayer paid Illinois sales tax at the time it purchased the items.

STATEMENT OF FACTS

Taxpayer is an in-state asphalt contractor providing commercial and residential asphalt construction and paving services.

The Indiana Department of Revenue (Department) conducted an audit review of taxpayer's business records for 2001 through 2003. The audit concluded that taxpayer owed additional Indiana use tax. Accordingly, the Department sent taxpayer notices of "Proposed Assessment." Taxpayer disagreed with the proposed assessments and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer explained the basis for its protest. This Letter of Findings results.

DISCUSSION

I. **Purchase of Asphalt from Illinois Vendors** – Sales Tax.

Indiana imposes a use tax on the "storage, use, or consumption of tangible personal property in Indiana . . . regardless of the location of that transaction or of the retail merchant making that transaction." IC 6-2.5-3-2. The tax is imposed on transactions that occur outside of Indiana that would be taxable if they occurred within Indiana but only if property is stored, used or consumed in Indiana. IC 6-2.5-2-1.

The imposition of the use tax, on purchases occurring outside the state, is qualified pursuant to 45 IAC 2.2-3-16 which allows an Indiana credit for "the amount of any sale, purchase, or use tax paid to any other state . . . with respect to the tangible personal property on which Indiana use tax applies." *See* IC 6-2.5-3-5(a).

Taxpayer bought liquid asphalt from two Illinois vendors. The liquid asphalt was transported from Illinois to taxpayer's Indiana location by common carrier. The vendors stipulated which common carriers were permitted to pick up the liquid asphalt and transport the material into Indiana. When the vendors sent taxpayer a bill for the asphalt, the vendors charged Illinois sales tax. The vendors' bill states that the F.O.B. point was at the site of the Illinois vendors. The common carriers sent taxpayer a separate bill for the transportation services.

The audit found the taxpayer purchased tangible personal property (the asphalt) which was subject to Indiana use tax because, "Indiana state gross retail tax [had] not been collected at the point of these purchases and use tax was not remitted upon disposition of the material."

Taxpayer apparently agrees that it owed the Indiana use tax but argues that it should be permitted a credit for the Illinois sales tax paid to the Illinois vendors. In support, taxpayer cites to IC 6-2.5-3-5(a) which states that, "A person is entitled to a credit against the use tax imposed on the use, storage, or consumption of a particular item of tangible personal property equal to the amount, if any, of sales tax, purchase tax, or use tax paid to another state . . . for the acquisition of that property." *See* 45 IAC 2.2-3-16.

The taxpayer has provided information purporting to establish that the Illinois sales tax (Retailers' Occupation Tax) was due and payable for taxpayer's purchase of liquid asphalt. Pursuant to Ill. Admin. Code tit. 86, § 130.605 (2000), "Where tangible personal property is located in this State at the time of its sale . . . and then delivered in Illinois to the purchaser, the seller is taxable if the sale is at retail: 1) the sale is not deemed to be in interstate commerce if the purchaser or his representative receives the physical possession of such property in this State. 2) This is so notwithstanding the fact that the purchaser may, after receiving physical possession of the property in this state, transport or send the property out of the state for use outside the State or for use in the conduct of interstate commerce." Ill. Admin. Code tit. 86, § 130.605(a)(1)-(2).

However, the administrative code also makes exceptions for certain purchases made within Illinois. Pursuant to Ill. Admin. Code tit. 86, § 130.605(b), "The tax does not extend to gross receipts from sales in which the seller is obligated, under the terms of his agreement with the purchaser, to make physical delivery of the goods from a point in [Illinois] to a point outside [Illinois], not to be returned to a point within [Illinois]." Under the terms of taxpayer's agreement, the liquid asphalt was not delivered to taxpayer; the liquid asphalt was transferred to a common carrier – paid for by taxpayer but selected by the vendors – for eventual delivery to taxpayer. The parties did not enter into a contract for delivery of hot asphalt in Illinois, and the taxpayer did not 'receive[] physical possession of the such property in [Illinois]." Ill. Admin. Code tit. 86, § 130.605(a)(1). The vendors

and taxpayer entered into an arrangement "to make physical delivery of the goods from a point in [Illinois] to a point outside [Illinois], not to be returned to a point within [Illinois]." Ill. Admin. Code tit. 86, § 130.605(b). The fact that the parties designated Illinois as the F.O.B. point is irrelevant in this analysis because, under Ill. Admin. Code tit. 86, § 130.605(d), "[t]he place at which title to the property passes to the purchaser is immaterial" Accordingly, taxpayer's purchase of liquid asphalt, designated for delivery and ultimate consumption within the state of Indiana, was not subject to the Illinois sales tax because "[s]ales of the type described in [Ill. Admin. Code tit. 86, § 130.605(b)] are deemed to be within the protection of the Commerce Clause of the Constitution of the United States." Ill. Admin. Code tit. 86, § 130.605(d).

Therefore, because Illinois sales tax was not due and payable on taxpayer's purchase of the liquid asphalt destined for Indiana, taxpayer is not entitled to an Indiana credit under 45 IAC 2.2-3-16. Instead, the purchase of the liquid asphalt is subject to Indiana use tax under IC 6-2.5-3-2 because the liquid asphalt constituted tangible personal property used or consumed in Indiana.

FINDING

Taxpayer's protest is respectfully denied.

II. Use Tax Assessments.

The audit assessed use tax on the purchase of "capital assets," vehicles, tools, supplies, and equipment because "sales tax was not paid at the time of purchase nor the use tax remitted to the Department of Revenue." Taxpayer challenges the assessments on the ground that it can now produce documentation establishing that it paid sales tax on the purchase of certain of these items and because it "is in the process of obtaining contemporaneous written documentation that the tax was paid [and] these documents will be available shortly."

IC 6-8.1-5-1(b) states that, "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is wrong."
The specific issue raised by taxpayer is not one amenable to resolution in a Letter of Findings. Nonetheless, taxpayer has met its threshold burden of demonstrating that it is entitled to have the documents presented reviewed by the audit division. The audit division is requested to review the documents which taxpayer has presented and to make whatever adjustments to the specific use tax assessments the audit division deems appropriate and justified. However, taxpayer is cautioned that the request to the audit division does not extend indefinitely to include whatever documents taxpayer deems to be "available shortly." Both taxpayer and the Department are entitled to a *timely and final* resolution of the issue.

FINDING

Subject to audit review of the documents taxpayer has presented within 30 days of the issuance of this Letter of Findings, taxpayer's protest is sustained to the extent that it paid sales tax at the time it purchased the various items at issue.